



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 21, 2005

Mr. David Caylor
City Attorney
City of Irving
City Attorney's Office
825 West Irving Boulevard
Irving, Texas 75060

OR2005-02382

Dear Mr. Caylor:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220350.

The City of Irving (the "city") received a request for a copy of two specific proposals. You make no arguments and take no position as to whether the information is excepted from disclosure, but state that the request may implicate the proprietary interests of third parties. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified Workbrain and Telestaff-PDSI of the request for information and of their right to submit arguments explaining why the information concerning them should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received briefs from both Workbrain and Telestaff-PDSI in which they both raise section 552.110 of the Government Code. We have considered their arguments and reviewed the submitted information.

Initially we note that while Workbrain claims an exception to the disclosure of a document entitled "Tab 7- Training.doc," which Workbrain states commences on page 29, the city did not submit this document to this office. This ruling does not address the applicability of

Workbrain's claimed exception for information that has not been submitted for our review by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under the Act must submit a copy or representative samples of the specific information requested).

Now we turn to the arguments for the submitted information. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;

- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Workbrain claims that Tabs 2, 4, 5, 9, and 12 of its proposal are protected as trade secrets. Upon review of the comments submitted by Workbrain and the submitted information, however, we determine that Workbrain has not demonstrated the necessary factors to establish a trade secret claim for the information at issue. We therefore determine that Tabs 2, 4, 5, 9, and 12 of Workbrain’s proposal are not excepted from disclosure under section 552.110(a).

Workbrain and TeleStaff-PDSI also contend that their respective proposals contain commercial and financial information that is excepted from disclosure under section 552.110(b). Workbrain seeks section 552.110(b) protection for Tabs 2, 4, and 5 stating that each contains detailed descriptions and specific information about certain functions of Workbrain’s system that has not been made publicly available and would result in substantial harm to Workbrain if it were released. Workbrain also specifically seeks to withhold the pricing information in Tabs 9 and 12 that would also result in substantial harm if released. TeleStaff-PDSI seeks section 552.110(b) protection for its entire submitted proposal stating that it contains descriptive information about its products and services as well as how they are priced.

Upon review of Workbrain's pricing terms in Tabs 9 and 12 and TeleStaff-PDSI's pricing terms within its proposal, we determine that this information is excepted from disclosure under section 552.110(b). However, after reviewing the respective arguments and remaining information, we find that neither Workbrain nor TeleStaff-PDSI has provided specific factual evidence substantiating its claims that the release of the information that each seeks to withhold under section 552.110(b) would result in substantial competitive harm to either company. Accordingly, we determine that none of the remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, the city may only withhold the marked information under section 552.110(b) of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

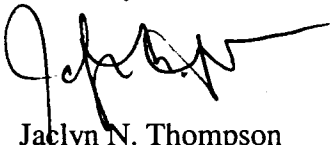
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/jev

Ref: ID# 220350

Enc. Submitted documents

c: Mr. Chris Harvey
Government & Education Industry
Manager
Kronos Incorporated
297 Billerica Road
Chelmsford, Massachusetts 01824
(w/o enclosures)

Mr. Greg Ekstrom
President
Telestaff-PDSI
625 The City Drive South, Suite 190
Orange, California 92868
(w/o enclosures)

Mr. Richard Guttman
Vice-President and General Counsel
Workbrain, Inc.
250 Ferrand Drive, Suite 1200
Toronto, ON M3C 3G8
(w/o enclosures)